## TECHNO ASIA HOLDING BHD

**v.**

## MOUNT AUSTIN PROPERTIES SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
GHAZALI CHA JC
[COMPANIES WINDING UP NO: 28-102-2004]
14 SEPTEMBER 2006

***COMPANY LAW:*** *Winding up - Liquidator - Application for orders to compel firm of advocates and solicitors to release stakeholder sums to liquidator - Whether court suitable to hear liquidator's application - Companies (Winding Up) Rules 1972, r. 163 - Liquidator an officer appointed by court - Companies Act 1965, s. 237(3) - Duties of liquidator to take custody of assets of company in liquidation - Companies Act 1965, s. 233(1) - Whether justice shall be done to order the release of stakeholders sums - Housing Developers (Control and Licensing) Act 1966, s. 7A*

***LEGAL PROFESSION:*** *Duty of care - Advocates and solicitors as stakeholders - Liquidator's application for release of stakeholder sums - Whether justice shall be done to order release of stakeholder sums - Whether solicitors should return to liquidator all money deducted from stakeholder sums as legal fees - Companies (Winding Up) Rules 1972, r. 163 - Companies Act 1965, ss. 233(1), 237(3) - Housing Developers (Control and Licensing) Act 1966, s. 7A*

The respondent company was ordered to be wound up by this court through a winding up order. The said order also appointed a private liquidator to be the liquidator of the respondent company. The present application filed by the liquidator was for directions as well as for orders to compel Messrs T.S Chong & Co, advocates and solicitors, to disclose the amount of money that they are holding as stakeholders for the respondent company (referred as 'stakeholder sums') and to release the stakeholder sums with interest to the liquidator. The background facts leading to the liquidator coming to the court for directions were that the respondent company, as a housing developer, had used the standard sale and purchase agreements to sell houses to purchasers which contained the standard clause requiring five percent of the purchase price to be held by a stakeholder for a period of eighteen months from the date vacant possession of the house was delivered to the purchaser. This 18 months period was

intended to be a 'defect liability' period. If the purchaser discovered any defect in the house during the 18 months' period and notified the developer about it, the developer had to repair the defect. If the developer failed to repair, part of the five percent of purchase price held by the stakeholder could be ordered by a court to be used to pay for the repairs. Messrs T.S Chong & Co were the solicitors appointed to be stakeholders for some of the houses sold by the respondent company. Messrs T.S Chong & Co raised the question as to whether this court was the right court to be hearing the liquidator's application. Messrs T.S Chong & Co also took the stand that they could not release the stakeholder sums held by them to the liquidator because some purchasers were making a claim against the respondent company.

**Held:**

**(1)** Rule 163 of the Companies (Winding Up) Rules 1972 provides that the court that ordered the winding-up of the company *ie*, the winding up court shall have power to hear all pending matters brought by or against the company. As the court that issued the winding up order, this court was the 'winding-up court' where the respondent company was concerned. The rationale for the said r. 163 in directing all proceedings regarding a respondent company to be heard by the winding-up court was to prevent duplicity of proceedings. The winding-up court had a complete record of the winding-up proceedings and was in the best position to give directions concerning the company that it had ordered to be wound up. This court, being the winding up court, was the most suitable court to hear the liquidator's application. (para 3)

**(2)** The alleged claims made by some purchasers were for liquidated damages for late delivery of their houses and not for any defects in the buildings during the 18 months' period. The liquidator also exhibited many confirmation letters signed by the purchasers to prove that those purchasers who reported defects had confirmed that the defects had been repaired. Those amounts of five percent purchase price held by the stakeholders were part of the purchase price paid by the purchasers to the developer *ie*, the respondent company. Messrs T.S Chong & Co should have released all the stakeholder sums to the respondent company when they were asked to do so by the special administrator when the company

was under special administration by Danaharta. Instead, Messrs T.S Chong & Co appeared to have kept the stakeholders money in their accounts and paid themselves legal fees by using the money that they were supposed to hold on trust as stakeholders. (paras 4 & 5)

**(3)** The liquidator was an officer appointed by the court and he may apply to this court for directions because his actions are subject to the supervision of this court (s. 237(3) Companies Act 1965.) He was not a director or a shareholder with vested interest in the respondent company. It was wrong of Messrs T.S Chong & Co to regard the liquidator as if he was a director of the respondent company. (para 6)

**(4)** Section 233(1) of the Companies Act 1965 imposes a duty on the liquidator to take custody of all assets of the company in liquidation, which in this case includes all the stakeholders sums held by Messrs T.S Chong & Co as well as fixed deposit interests earned. Messrs T.S Chong & Co should have released the fixed deposit interest information requested as well as the stakeholders sums to the liquidator, and then submit their bills for legal fees to the liquidator to ask for payments as a creditor. Messrs T.S Chong & Co were not solicitors instructed by the liquidator. They were appointed as stakeholders prior to liquidation. Justice shall be done to order them to release all the stakeholders sums they received as stakeholders together with all fixed deposit interests that they received without penalizing them with additional interest or costs. They must, however, return to the liquidator all the money that they have deducted from the stakeholder sums as their fees. (paras 6 & 7)

**(5)** The effect of s. 7A of the Housing Developers (Control and Licensing) Act 1966 is that all the stakeholders sums held by Messrs T.S Chong & Co are monies paid by purchasers that must go into a housing development account for the benefit of all the purchasers. If all purchasers paid their purchase in full to the liquidator, the liquidator would be able to pay out the same percentage of liquidated damages for late delivery of houses to all purchasers who were entitled to receive liquidated damages. In order to achieve a fair result and to protect all purchasers equally without any undue preference, the liquidator must be directed to collect the balance purchase

price in full from all purchasers who purchased houses from the respondent company and not to allow any set-off. He is to transfer all the purchase monies received, including the stakeholders sums collected into a special account similar to a housing development account. The monies in this account shall be utilized to pay off expenses and professional fees directly related to the development of those houses sold to those purchasers. The liquidator was also authorized to utilize the monies in this account to pay his fees to act as liquidator of the respondent company. This was fair, bearing in mind that the liquidator was an officer of this court and without him to act professionally in liquidating the respondent company, the purchasers would probably never be able to receive a single cent of liquidated damages. The balance monies in this account at the end of the liquidation process are to be distributed pro-rata to those purchasers who are entitled to liquidated damages for late delivery of their houses. (paras 9 & 10)

**(6)** The liquidator had prayed for an advocate and solicitor, namely, one Lee Poh Chin to be permanently appointed by this court to assist him in carrying out his duties in the winding up of the respondent company. There was nothing in his affidavit to explain the need for this appointment or the credentials of this Lee Poh Chin. Hence, this court did not see the need for this permanent appointment as it would cause the respondent company to incur additional expenses unnecessarily. (para 13)

*[Order accordingly.]*

**Legislation referred to:**
Companies Act 1965, ss. 224, 233(1), 237(3)
Companies (Winding-up) Rules 1972, r. 163
Housing Developers (Control and Licencing) Act 1966, s. 7A

*For the petition - T Gan; M/s Gan & Lim*
*For the liquidator - PC Lee; M/s PC Lee & Assoc*
*For the stakeholder - Norliza (KC Chong with him); M/s TS Chong & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Ghazali Cha JC:**

**[1]** The respondent company Mount Austin Properties Sdn Bhd was on 26 April 2005 ordered to be wound-up by this court through a winding-up order made by my predecessor Justice Dato' Kang Hwee Gee. The said order also appointed a private liquidator, namely Mr.Tee Siew Kai, to be the liquidator of the respondent company.

**[2]** The present application filed by the liquidator is for directions as well as for orders to compel Messrs T.S.Chong & Co., Advocates & Solicitors, to disclose the amount of money that they are holding as stakeholders for the respondent company (referred as "Stakeholder Sums") and to release the Stakeholder Sums with interest to the liquidator.

**[3]** Counsel for Messrs T.S.Chong & Co raised the question as to whether this court is the right court to be hearing the liquidator's application. The answer to this question is to be found in the Companies (Winding-up) Rules 1972. Rule 163 provides that the court that ordered the winding-up of the company, ie, the winding-up court shall have power to hear all pending matters brought by or against the company. As the court that issued the winding-up order, this court was the "winding-up court" where the respondent company is concerned. The rationale for the said r. 163 in directing all proceedings regarding a respondent company to be heard by the winding-up court is to prevent duplicity of proceedings and also because the winding-up file contains all affidavits and other cause papers that had been filed. In other words, the winding-up court has a complete record of the winding-up proceedings and is in the best position to give directions concerning the company that it had ordered to be wound-up. I therefore hold that this court, being the winding-up court, is the most suitable court to hear the liquidator's application.

**[4]** The background facts leading to the liquidator coming back to this court for directions are as follows. The respondent company was a housing development company. As a housing developer, the standard sale and purchase agreements used to sell houses to purchasers contain the standard clause, which required five percent (5%) of the purchase price to be held by a stakeholder for a period of 18 months from the date vacant

possession of the house was delivered to the purchaser. This 18 months period was intended to be a "defect liability period". If the purchaser discovered any defect in the house during the 18 months period and notified the developer about it, the developer had to repair the defect. If the developer failed to repair, part of the 5% of purchaser price held by the stakeholder could be ordered by a court to be used to pay for the repairs. Messrs T.S.Chong & Co were the solicitors appointed to be stakeholders for some of the houses sold by the respondent company.

**[5]** Messrs T.S.Chong & Co took the stand that they could not release the stakeholder sums held by them to the liquidator because some purchasers are making a claim against the respondent company. A study of the letters exchanged between the parties, as exhibited in the affidavits filed, show that the alleged claims made by some purchasers who wrote to Messrs T.S.Chong & Co were for liquidated damages for late delivery of their houses and not for any defects in the buildings during the 18 months period. According to counsel for the liquidator, all the houses had been delivered to the purchasers by August 2001, which meant that the 18 months defect liability period for all the houses had expired, by the latest, March 2003. The liquidator also exhibited many confirmation letters signed by the purchasers to prove that those purchasers who reported defects had confirmed that the defects had been repaired. It is clear that those amounts of 5% purchase price held by the stakeholders were part of the purchase price paid by the purchasers to the developer, ie, the respondent company. Messrs T.S.Chong & Co should have released all the stakeholders sums to the respondent company when they were asked to do so by the Special Administrator in March 2003 when the respondent company was under special administration by Danaharta. It is true that the respondent company could not be sued while it was under special administration by Danaharta but that certainly did not prevent Messrs T.S.Chong & Co from applying to court for directions if they had any doubt. Applying for directions and suing for payment are two completely different types of proceedings. Instead, Messrs T.S.Chong & Co appeared to have kept the stakeholders money in their accounts and paid themselves legal fees by using the money that they are supposed to hold on trust as stakeholders.

**[6]** The other point that must be highlighted is that the liquidator is an officer appointed by this court and he may apply to this court for directions because his actions are subject to the supervision of this court. (See s. 237(3) Companies Act 1965). He is not a director or a shareholder with vested interest in the respondent company. It was wrong of Messrs T.S.Chong & Co to regard the liquidator as if he is a director of the respondent company. Section 233(1) of the Companies Act 1965 reads:

> Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.

This section imposed a duty on the liquidator to take custody of all assets of the company in liquidation, which in this case includes all the stakeholders sums held by Messrs T.S.Chong & Co as well as all fixed deposit interests earned. Messrs T.S.Chong & Co should have released the fixed deposit interest information requested as well as the stakeholders sums to the liquidator, and then submit their bills for legal fees to the liquidator to ask for payment as a creditor. This is because Messrs T.S.Chong & Co were not solicitors instructed by the liquidator. They were appointed as stakeholders prior to liquidation. Justice shall be done to order them to release all the stakeholders sums they received as stakeholders together with all fixed deposit interests that they received without penalising them with additional interest or costs. They must, however, return to the liquidator all the money that they have deducted from the stakeholders sums as their fees.

**[7]** Since there are purchasers who still owe balance of purchase price for the houses they bought and would like to deduct what they calculated as liquidated damages for late delivery from the balance purchase price, it is necessary to examine the right of set-off in this case. If a company is not in liquidation, the issue of undue preference of creditors does not arise at all. Its directors are free to agree to set-off of debts with its creditors and debtors. If a company is in liquidation, the law controls what may be set-off. However, the respondent company in this case is a housing developer. This means I have to consider the Housing Developers (Control And Licensing) Act 1966 to decide this issue.

**[8]** Section 7A of the Housing Developers (Control And Licensing) Act 1966 was a section in the Act designed to protect purchasers. It reads:

> 7A. (1) Subject to subsection (9), every licensed housing developer shall open and maintain a Housing Development Account with a bank or finance company for each housing development undertaken by the licensed housing developer.
>
> (2) …
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> (3) The licensed housing developer shall pay into the Housing Development Account of a housing development the purchase monies received by the licensed housing developer from the sale of housing accommodation in the housing development and any other sum or sums of money which are required by regulations made under this Act to be paid into the Housing Development Account.
>
> (4) …
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> (5) Subject to subsection 6(b), all monies in the Housing Development Account shall, notwithstanding any other written law to the contrary, be deemed not to form part of the property of the licensed housing developer in the event:
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> (a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or an adjudication order made against him; or
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> (b) the licensed housing developer, being a company, goes into voluntary or compulsory liquidation.
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> (6) Upon the happening of any of the event referred to in subsection (5):
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> (a) the monies in the Housing Development Account shall vest in the official receiver, trustee in bankruptcy or liquidator as the case may be, to be applied for all or any of the purposes for which monies in the Housing Development Account are authorised by regulations made under this Act to be withdrawn; and
>
> (b) any money remaining in the Housing Development Account, after all payments have been made pursuant to paragraph (a) and all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have

> been fully discharged and fulfilled, shall be held by the official receiver, trustee in bankruptcy or liquidator as the case may be, as money belonging to the licensed housing developer to be applied in accordance with the law relating to bankruptcy of or the winding-up of a company.

**[9]** The effect of the said s. 7A is that all the stakeholders sums held by Messrs T.S.Chong & Co are monies paid by purchasers that must go into a Housing Development Account for the benefit of all the purchasers. If all purchasers paid their purchase in full to the liquidator, the liquidator would be able to pay out the same percentage of liquidated damages for late delivery of houses to all purchasers who are entitled to receive liquidated damages. All purchasers would receive pro-rata, the same percentage of their claim for liquidated damages for late delivery. Pro-rata in this case means equal percentage for all purchasers. What would happen if some purchasers are allowed to set-off the balance of their purchase price by deducting liquidated damages from the amount they owe the respondent company? The result would be that the total amount deposited into the liquidation account would be less. This result would be most unfair because most purchasers would have paid their purchase price in full but getting a smaller percentage of their liquidated damages while some purchasers would end up getting paid 100% of liquidated damages by deducting it directly from the money they owed the respondent company.

**[10]** In order to achieve a fair result and to protect all purchasers equally without any undue preference, the liquidator must be directed to collect the balance purchase price in full from all purchasers who purchased houses from the respondent company and not to allow any set-off. He is to transfer all the purchase monies received, including the stakeholders sums collected into a special account similar to a Housing Development Account. The monies in this account shall be utilised to pay off expenses and professional fees directly related to the development of those houses sold to those purchasers. The liquidator is also authorised to utilise the monies in this account to pay his fees to act as liquidator of the respondent company. This is fair, bearing in mind that the liquidator is an officer of this court and without him to act professionally in liquidating the respondent company, the purchasers would probably never be able to receive a single cent

of liquidated damages. The balance monies in this account at the end of the liquidation process are to be distributed pro-rata to those purchasers who are entitled to liquidated damages for late delivery of their houses.

**[11]** As the liquidator is seeking directions from this court and I have noticed the presence of an application filed within this same winding-up file to try to garnish money belonging to the respondent company, I must point out s. 224 of the Companies Act 1965:

> Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up by the Court shall be void.

**[12]** This means that execution proceedings, including garnishee proceedings commenced after the filing of the winding-up petition in this case are void. The judgment creditors must queue together with other unsecured creditors for the liquidator to deal with their claims. The exception to this rule is a company that is in voluntary winding-up whereby the directors and/or shareholders of the company have declared that the company is able to pay off all the company's creditors in full. However, in our present case s. 224 clearly applies because the respondent company was wound-up by this court. The respondent company was not a company in members voluntary winding-up. The other law which clearly prohibit the money paid by purchasers to a housing developer from being garnished by creditors is sub-section (7) of s. 7A of the Housing Developers (Control And Licensing) Act 1966:

> (7) Notwithstanding any other written law to the contrary, all monies in the Housing Development Account shall not be garnished until all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled.

**[13]** I have noted that the liquidator has prayed for an advocate and solicitor, namely "Lee Poh Chin" to be permanently appointed by this court to assist him in carrying out his duties in the winding-up of the respondent company. However, there was nothing in his affidavit to explain the need for this appointment or the credentials of this "Lee Poh Chin". It must be noted that the law allows a liquidator to instruct counsel or solicitors to advise or act for him as and when the need arises. Hence, I do not see the need for this permanent appointment as it will cause the respondent company to incur additional expenses unnecessarily.

**[14]** In conclusion, I make the following Orders:

(1) Messrs T.S.Chong & Co must, within 14 days, provide the liquidator with a copy of all the banks Fixed Deposits Receipts for the stakeholders sums as well as complete Statements of Account showing all fixed deposit interests received since they started acting as stakeholders;

(2) Messrs T.S.Chong & Co must pay, within 14 days, to the liquidator all the stakeholders sums that they received as stakeholders, together with all Fixed Deposit interests earned on those stakeholders sums;

(3) Messrs T.S.Chong & Co are to repay to the liquidator the fees that they deducted from the stakeholders sums or the fixed deposit interest, and they are to submit their bills for legal fees to the liquidator separately as a creditor of the respondent company;

(4) The liquidator is to collect all balance purchase monies from the purchasers of houses sold by the respondent company and to set up a special account similar to a Housing Development Account to deposit all the balance purchase monies collected from these purchasers as well as the stakeholders sums;

(5) The monies in the special Housing Development Account shall be utilised by the liquidator to pay expenses and professional fees directly related to the development of the houses sold to those purchasers and to pay his own fees to act as liquidator of the respondent company;

(6) The balance monies in the special Housing Development Account at the end of the liquidation process are to be distributed pro-rata to purchasers who are entitled to liquidated damages for late delivery of their houses;

(7) The liquidator's application to appoint Lee Poh Chin to assist him is dismissed;

(8) Lastly, no order as to costs.